

By Mark Noonan

Employers are likely to see a drop in new workers' compensation laws in 2010, as lawmakers target their focus on budget issues and the economy. Clifford Leach of The Hartford Financial Services Group predicts that major reforms will not be enacted by state legislatures in 2010. (Texas legislature is not in session this year, but California, New York, and Massachusetts legislatures may be impacted by state elections.) Although workers' compensation issues remain vital and critical for employers, most states cannot afford to expand benefits and, unfortunately, will likely not act on new cost containment measures. Employers can take advantage of this temporary break in legislative change by tackling some of the current workers' compensation topics discussed below.

## **New Ergonomics Standard on OSHA's Agenda**

Although we may not see major changes from state legislatures, employers may see the beginning of change in ergonomic standards from the Occupational Safety and Health Administration (OSHA). Under President Obama's administration, David Michaels was confirmed as assistant secretary for OSHA in December 2009. He is known for his desire to implement an enforceable national ergonomics standard through new regulations and rulemaking. As such, OSHA is expected to propose a rule early this year that would require employers to separately list work-related musculoskeletal disorders (MSDs) from other conditions. This change in data-collection will likely form the basis for the use of data to make changes in the current ergonomic standards. Industry specific standards may also be considered.

## **NCCI Study: Older Workers / Less Claims**

In January 2010, the National Council on Compensation Insurance (NCCI) released a study on claim characteristics of workers aged 65 and older. In a previous study that was completed in December 2006, NCCI examined how severity and frequency varied among workers between the ages of 20 and 64. Since this time, employees are now opting to work longer before retiring due to economic considerations. In fact, since the late 1980s, the labor force participation rate of workers aged 55 to 64 has increased (from 55 percent to 65 percent), and the percentage of workers 65 and older has increased by nearly 50 percent.

In its most recent study, NCCI noted the major factors that help explain the sharp increase in labor force participation rates among older workers:

- Legislative changes to Social Security, such as moving the normal retirement age (from 65 to 67 for those born after 1960) and delaying retirement credit.
- Employers are shifting toward defined contribution plans, versus defined benefit plans.
- Additional factors, such as increased life expectancy, the rising cost of living, decline in physically demanding jobs, and an overall improved health of older workers.

NCCI predicts further increases in the future as the economy attempts to recover. For this increased group of older workers, the NCCI study found that while indemnity severity is less for older workers, the medical severity is higher. Claim frequency was higher for older workers in the leisure and hospitality industry, food preparation and service industry, and sales and related occupations. However, claim frequency was lower in more hazardous occupations such as manufacturing and construction-related industries where older workers are likely to be supervisors. Slips, trips, and falls were the greatest cause of injury.

Although the rate of workers' compensation claims and payments for workers over age 65 is typically small, the increase in older workers creates a concern and challenge for safety and loss prevention managers. Employers can reduce the risk of injury from such things as installing slip-resistant flooring to providing wellness programs.

A copy of NCCI's report can be accessed here: <https://www.ncci.com/documents/Claims-65andOlder.pdf>

### **AMA Stance Changes on Medical Marijuana**

In the United States, thirteen states allow the use of prescribed medical marijuana. The use of medical marijuana and workers' compensation benefits raises questions that will be interesting to follow in 2010. When used to treat a work-place injury, who will pay for the prescription? Is there enough research to classify marijuana as a prescribed drug?

Early in 2009, the Obama Administration ordered that federal narcotics agents could not arrest medical marijuana users and providers that were following state laws. The topic has come back into the media since the American Medical Association (AMA) began to soften its position on keeping marijuana classified as a highly restricted drug. In November 2009, the AMA urged the federal government to reevaluate its classification of marijuana as a "dangerous drug with no accepted medical use." The change in the AMA's position would allow for and require more testing on whether or not there is a medical use for marijuana. This is a significant policy switch since the AMA was an advocate of marijuana remaining a Schedule I controlled substance (the most restrictive category).

Outside of the United States, a Canadian worker is fighting with the Workers' Compensation Board in Saskatchewan because they won't pay for his medicinal marijuana prescribed for post-traumatic stress illness due to a workplace incident. The Board says its drug coverage does not include medicinal marijuana since there is not enough research done yet on marijuana's medical benefit. This case may be a preview of future arguments that will have to be worked out in the court systems where marijuana prescriptions and a state's workers' compensation system are at odds.

For a full report from the AMA, go here: <http://www.ama-assn.org/ama/no-index/about-ama/13625.shtml>

## Protective Gear: Time on Task?

Is the time spent at the beginning of work putting on protective gear and the time spent taking it off at the end of the work day considered time on task and compensable? In 2005, the U.S. Supreme Court ruled in favor of the workers and stated that the time the meatpackers spent donning and doffing protective gear was compensable. Since then, other courts have split on the issue – a topic that has been brought up again in an appeals court.

In December 2009, the 4th U.S. Circuit Court of Appeals in Richmond ruled against poultry workers stating that putting on and removing protective gear is “changing clothes” and not necessarily compensable under the Federal Labor Standards Act (*Sepulveda v. Allen Family Foods, Inc.*, No. 08-2256). The workers at Allen Family Foods must wear steel-toe shoes, a smock, plastic apron, earplugs, safety glasses, and a safety cap over a hair net, rubber gloves, mesh sleeves, and arm shields before they can begin to de-bone chickens. It takes workers fifteen minutes at the beginning and at the end of their shift to get their gear on/off – time they will not be paid for since it is not considered “time on task.”

We will keep our eye on this issue and future rulings. In the meantime, for more information and a copy of the ruling, go here: <http://pacer.ca4.uscourts.gov/opinion.pdf/082256.P.pdf>

## Analyzing Medicare’s Medical Cost Containment Method

Medicare pays a significant amount of medical costs and, because of this, Medicare reimbursement rates influence prices generally paid for medical services – including medical services for workers’ compensation. Many states base their workers’ compensation medical fees schedules on the Medicare physician reimbursement schedule, and are also affected by changes to Medicare reimbursement rates. Workers’ compensation medical costs, however, can also be affected by changes to the formulas Medicare uses to determine reimbursement amounts and/or how Medicare allocates payments by type of service. NCCI’s latest research brief, *Medicare and Workers Compensation Medical Cost Containment*, examines the role that Medicare plays in workers’ compensation medical cost containment. The study emphasizes the common ground between workers’ compensation and Medicare, and the options that could help guide medical cost containment and benefit reform for workers’ compensation on a countrywide perspective.

The proportion of workers’ compensation medical costs subject to physician fee schedules is declining. NCCI states that this is threatening the effectiveness of the traditional cost containment measure. NCCI suggests that workers’ compensation consider using Medicare billing approaches for hospital stays and ambulatory services in order to maintain the effectiveness of medical fee schedules – if the Medicare models are adapted to workers’ compensation priorities. NCCI also points out that as the workforce ages, workers’ compensation should focus more on safety initiatives towards falls and hip injuries, and Medicare protocols would provide insight on designing treatment guidelines.

A copy of NCCI’s report can be accessed here: [www.ncci.com](http://www.ncci.com).

## Healthcare Reform Stalling Return-to-Work

It is unknown how the healthcare legislation will impact workers' compensation. But medical providers, including those that treat workers' compensation injuries, are not taking any chances in case a final healthcare reform bill eliminates some of their business.

We are witnessing medical providers who are deferring investment in new or "next generation" medical equipment – including equipment that could be used to treat work-related injuries. Research spending that could lead to improved treatment for injured workers, returning them to work more quickly, has been affected by the pending legislation, too. The economic stagnation will most likely contribute to injury severity over the long term. At the same time, employers hindered by the recession may not be spending the appropriate resources on developing new processes that could reduce worker injuries. This includes such resources as pharmacy benefit managers and vendors that support the diagnosis, treatment, and/or return-to-work process.

## For More Information

At Integro, we believe the best defense in this economy is to continue to empower our clients with knowledge and tools, programs and practices that help preserve and protect invaluable business assets—financial and physical, operations and people—against any workers' compensation risk in any economic state.

We aspire to be a client's broker of choice by consistently exceeding expectations and building intimate trust. If you need assistance or more information on any workers' compensation issues, please contact an Integro representative or visit us online at [www.integrogroup.com](http://www.integrogroup.com).

### Mark Noonan

Managing Principal

#### Integro Insurance Brokers

303 Congress Street, 3<sup>rd</sup> Floor

Boston, MA 02110

Tel: (617) 531-6855

Email: [Mark.Noonan@integrogroup.com](mailto:Mark.Noonan@integrogroup.com)

### James Bacon

Managing Principal

#### Integro Insurance Brokers

One Bush Street, 14<sup>th</sup> Floor

San Francisco, CA 94104

Tel: (415) 365-4230

Email: [Jim.Bacon@integrogroup.com](mailto:Jim.Bacon@integrogroup.com)

### Carl Cincotta

Principal

#### Integro Insurance Brokers

1 State Street, 9<sup>th</sup> Floor

New York, NY 10004

Tel: (212) 295-5480

Email: [Carl.Cincotta@integrogroup.com](mailto:Carl.Cincotta@integrogroup.com)

### Stephen Miller

Managing Principal

#### Integro Insurance Brokers

200 W. Madison St., Suite 2500

Chicago, IL 60606

Tel: (312) 780-8100

Email: [Stephen.Miller@integrogroup.com](mailto:Stephen.Miller@integrogroup.com)

---

Integro is an insurance brokerage and risk management firm dedicated to serving the insurance and risk management needs of complex institutional risks. Integro has offices across North America, as well as in Bermuda and London. Its headquarter office is located at 1 State Street Plaza, 9th Floor, New York, NY 10004. 1-877-688-8701. [www.integrogroup.com](http://www.integrogroup.com)

Copyright © 2010, Integro USA Inc.